

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33043

JEFFERY V. HARRIS,	)	2008 Unpublished Opinion No. 622
	)	
Petitioner-Appellant,	)	Filed: August 27, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Ronald E. Bush, District Judge.

Order summarily dismissing petition for post-conviction relief, reversed and case remanded.

Molly J. Huskey, State Appellate Public Defender; Erik R. Lehtinen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

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GUTIERREZ, Chief Judge

Jeffery V. Harris appeals from the district court's summary dismissal of his petition for post-conviction relief. We reverse and remand the case based on the district court's failure to apply the correct standard for appointment of counsel and its failure to provide adequate notice of the grounds upon which summary dismissal was granted.

I.

FACTS AND PROCEDURE

After failing to come to a complete stop at a stop sign in a vehicle with no rear license plate, Harris was stopped by a Pocatello police officer. As the officer ran a driver's license check, Harris fled on foot. The officer discovered that Harris's driving privileges had been suspended and that there was an outstanding warrant for his arrest. Harris's vehicle was

impounded and during an inventory search, several small baggies and a clear glass tube with crystalline residue were discovered that field tested positive for methamphetamine.

Harris was located at his residence and placed under arrest. During the search of Harris's person incident to his arrest, two more baggies containing a white crystalline substance were found and also field tested positive for methamphetamine. Later, the owners of the home where Harris had parked his vehicle during the initial stop contacted the police, reporting that they had found two baggies containing a white crystalline substance in their driveway. The baggies matched those found on Harris's person and field tested positive for methamphetamine.

Harris was charged with possession of methamphetamine, Idaho Code § 37-2732(c)(1), and with being a persistent violator, I.C. § 19-2514, based on his prior convictions for two felonies. He entered into a plea agreement whereby he pled guilty to the possession charge and the state dismissed the persistent violator charge and recommended a sentence of seven years, with three years determinate. Despite this recommendation, the sentencing court imposed a unified sentence of seven years, with five years determinate. On direct appeal, this Court affirmed Harris's sentence. *State v. Harris*, Docket No. 31322 (August 23, 2005) (unpublished).

Harris then filed a *pro se* petition for post conviction relief alleging that he had received ineffective assistance of counsel. His petition was accompanied by a motion for appointment of counsel. The state responded by filing a motion for summary disposition of the petition. Harris filed a response, but the district court denied both his petition for post-conviction relief and his motion for appointment of counsel in one order. Harris now appeals.

## II.

### ANALYSIS

#### A. Denial of Appointment of Counsel

Harris argues that the district court erred in denying his request for appointment of counsel. If a post-conviction applicant is unable to pay for the expenses of representation, the trial court may appoint counsel to represent the applicant in preparing the application, in the trial court and on appeal. I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). When a district court is presented with a request for appointed counsel, the court must address this request before ruling on the substantive issues in the case. *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111; *Fox v. State*, 129 Idaho 881, 885, 934 P.2d

947, 951 (Ct. App. 1997). The district court abuses its discretion where it fails to determine whether an applicant for post-conviction relief is entitled to court-appointed counsel before denying the application on the merits. *See Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

In determining whether to appoint counsel pursuant to section 19-4904, the district court should determine if the applicant is able to afford counsel and whether the situation is one in which counsel should be appointed to assist the applicant. *Charboneau* 140 Idaho at 793, 102 P.3d at 1112. In its analysis, the district court should consider that applications filed by a *pro se* applicant may be conclusory and incomplete. *See id.* at 792-93, 102 P.3d at 1111-12. Facts sufficient to state a claim may not be alleged because they do not exist or because the *pro se* applicant does not know the essential elements of a claim. *Id.* Some claims are so patently frivolous that they could not be developed into viable claims even with the assistance of counsel. *Newman v. State*, 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004). However, if an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts. *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112. As our Supreme Court discussed in *Swader v. State*, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007), a petitioner may fail to allege facts supporting a valid claim because they do not exist, or because he is unable to conduct an adequate investigation while incarcerated. Therefore, the trial court should consider whether the facts alleged are such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claims. *Id.* Although the petitioner is not entitled to have counsel appointed in order to search the record for possible non-frivolous claims, the court should appoint counsel if the facts alleged raise the possibility of a valid claim. *Id.* (citing *Brown v. State*, 135 Idaho 676, 679, 23 P.3d 138, 141 (2001)).

Harris twice requested the court appoint him counsel--initially in conjunction with his petition for post-conviction relief and again after the state moved for summary dismissal of his petition. The court denied his request in the Memorandum Decision and Order summarily dismissing his post-conviction claims. Specifically, at the conclusion of the order, the court noted that “[a]lso before the Court are Harris’ Motion and Affidavit in Support for Appointment of Counsel . . . . Given the practical result of the Court’s decision on Harris’ Petition for Post

Conviction Relief, there is not good reason to grant these motions. Thus, Petitioner’s Motion and Affidavit in Support for Appointment of Counsel . . . are hereby DENIED.”

Harris argues the court abused its discretion by applying the wrong standard to its determination of whether his claims merited the appointment of counsel and by subsequently denying his request. The state appears to concede this point. As discussed above, the standard in determining whether counsel should be appointed is whether a petitioner asserts the *possibility* of a claim. By denying Harris’s request for counsel *because* it was summarily dismissing his claims, the court impermissibly raised the standard to whether the petitioner made an assertion of claims that could survive summary dismissal--a higher burden than the possibility of a claim. *See Swader*, 143 Idaho at 655, 152 P.3d at 16 (“[T]he decision to appoint counsel and the decision on the merits of the petition . . . are controlled by two different standards.”).

We also note that the district court erred by dismissing the post-conviction application prior to addressing a request for appointment of counsel. *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112. In *Charboneau*, our Supreme Court concluded that, “at a minimum, the trial court must carefully consider the request for counsel before reaching a decision on the substantive merits of the petition and whether it contains new and admissible evidence.” *Id.* at 794, 102 P.3d at 1113. Thus, even if the court’s denial of Harris’s request for counsel was based on the proper standard, it was error for the court to summarily dismiss his claims before considering his request for counsel.

In *Swader*, after finding the district court had applied an incorrect standard when denying the petitioner’s motion for post-conviction counsel, the Idaho Supreme defined the correct inquiry as whether such an error was prejudicial. The Court directed that we must ask whether, if the standard announced in *Charboneau* is applied, the motion for appointment of counsel should have been granted. *See Swader*, 143 Idaho at 653, 152 P.3d at 14. However, we need not proceed with a harmless error analysis in this case because, as we discuss below, the state agrees that remand is appropriate for inadequate notice in the dismissal of six of Harris’s eight post-conviction claims.

## **B. Summary Dismissal of Post-Conviction Petition**

If a district court determines claims alleged in an application do not entitle an applicant to relief and dismisses on its own initiative, the court must provide notice of its intent to dismiss and allow the applicant twenty days to respond with additional facts to support his or her claims.

I.C. § 19-4906(b); *Garza v. State*, 139 Idaho 533, 536, 82 P.3d 445, 448 (2003). The district court's notice should provide sufficient information regarding the basis for its ruling so as to enable the applicant to supplement the application with the necessary additional facts, if they exist. *Newman*, 140 Idaho at 493, 95 P.3d at 644. Likewise, if the court dismisses on the state's motion for summary dismissal, the motion must state grounds with particularity, and the applicant must be given twenty days to make a response. *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995); *State v. Christensen*, 102 Idaho 487, 488-89, 632 P.2d 676, 677-78 (1981). Here, the district court did not issue a notice of intent to dismiss. Therefore, we examine whether the state's motion for summary dismissal provided adequate notice.

Harris specifically lists eight claims for which he alleges that he did not receive notice: (1) the failure of his attorney to file a motion to suppress; (2) the failure of his attorney to seek the return of the money confiscated from him at the time of his arrest; (3) his attorney's alleged promise that Harris would receive a sentence of only three years fixed; (4) his attorney's failure to inform Harris that the methamphetamine was not tested in a laboratory; (5) the failure of his attorney to discover the alleged broken chain of custody with regard to the methamphetamine evidence; (6) his attorney's ineffective assistance of counsel due to an overwhelming case load; (7) his attorney's failure to conduct adequate pretrial investigation; and 8) the failure of his attorney to educate himself and act upon relevant case law. The state concedes that Harris was not provided sufficient notice with regard to claims 1, 2, 5, 6, 7, and 8. Thus, we conclude the district court's summary dismissal of these claims was erroneous.

In claim 4, Harris asserts that his counsel was ineffective for not telling him that the methamphetamine was not tested in a laboratory. Harris argues that he did not receive adequate notice before the court's summary dismissal of this claim. The state, in its memorandum in support of summary dismissal, refers to Harris's claim as merely presenting "conclusory" allegations. It further states:

Then, the Petitioner goes on to make several claims about a supposed break in the chain of evidence and how the evidence was not tested by the state labs. However, the evidence was tested by a field test and was positive for methamphetamine. The Petitioner could have had those items tested if he chose to request it. Rather, the Petitioner chose to try and work out a plea agreement with the State.

In dismissing this claim, the district court made a list of Harris's claims that included the drug testing issue and explained that none of them, including the decision whether or not to have the

drugs tested, “is supported by anything but Harris’ self-serving conclusory allegations . . . . [T]here is nothing in the record that supports these claims.” The state contends that the district court dismissed on the same grounds as it raised in its motion for summary dismissal and that its motion was sufficient to provide the requisite notice. However, it does not appear to this Court that the district court’s stated rationale for the dismissal is the same as that advanced by the state. Thus, we conclude that the district court’s dismissal fails for lack of sufficient notice.

Harris also asserts, in claim 3, that the district court erred in summarily dismissing his claim that his counsel provided ineffective assistance by promising him that he would receive a sentence of seven years, with only three years determinate. Specifically, he argues that he did not receive sufficient notice since the district court dismissed the claim on different grounds than were advanced by the state in its motion for summary dismissal. We conclude that Harris did not receive sufficient notice because the district court summarily dismissed his claim on a ground that had not been advanced by the state. In moving for summary dismissal of Harris’s claim, the state argued that Harris had not alleged a “cognizable claim of ineffective assistance of counsel.” Specifically in regard to his contentions surrounding his guilty plea, the state asserted that:

[T]he Petitioner was advised in court exactly what the plea agreement was. Per the plea agreement the state dismissed the persistent violator [charge] and agreed to recommend a sentence of three [years] fixed and four [years] indeterminate. However, that was not a binding plea agreement upon the court. Therefore, the Court was free to make it’s own decision regarding the appropriate sentence. The Court questioned the Petitioner prior to the acceptance of the guilty plea and made sure that it was knowing and voluntary. There is no basis for the Petition[er] to now claim that his plea was based on erroneous advice.

The district court, on the other hand, did not analyze this issue as one of ineffective assistance of counsel, notably failing to list it among the other claims which it addressed under the ineffective assistance of counsel analysis in its order summarily dismissing Harris’s claims. Instead, the court analyzed the issue in the context of a due process violation, deciding that Harris was not entitled to post-conviction relief, because it was an issue that could have been raised on direct appeal. This is a significantly distinct approach to the issue from that argued by Harris and addressed by the state--subject to distinct analysis. It is true, as the state asserts that the court referred to the state’s argument, but we note that the court did not rely on this argument to dispense with the issue; rather it deviated from the ineffective assistance of counsel paradigm altogether, dismissing on the grounds that Harris could have brought the issue on direct appeal

and that his post-convictions assertions were “conclusory.” Thus, we conclude that Harris did not receive adequate notice.

### **III. CONCLUSION**

The district court erred in applying the incorrect standard to Harris’s request for appointment of post-conviction counsel, as well as in failing to address the request prior to summarily dismissing his post-conviction claims. The court also erred in summarily dismissing each of Harris’s claims in his post-conviction petition as the requisite notice was not given. Consequently, we remand the case to the district court for further proceedings consistent with this opinion.

Judge LANSING and Judge PERRY **CONCUR.**